No opium or residue of opium was found in the pipe or anywhere in the hut and therefore no presumption arises under section 37 of the Ordinance.

Although the appellant had the opium needle in his hand — the appellant's position was that he was merely fiddling with it — it seems to me that in the absence of any evidence that he was smoking opium (or indeed that there was no opium which he could have smoked) that the mere fact of the appellant's proximity to these articles, in somebody else's hut does not constitute sufficient evidence of possession to justify a conviction.

For these reasons the appeal must be allowed and the conviction and sentence quashed.

Appeal allowed.

Solicitors: *Elias Bros.*

N.V. KONINKLIJKE PAKETVAART MAATSCHAPPIJ (ROYAL PACKET NAVIGATION CO. LTD.) v. YEE CHANG & CO. LTD.

[C.A. (Tan Ah Tah, Chua and Wee Chong Jin JJ.) February 4, 1959]

[Singapore — Civil Appeal No. 20 of 1958]

Practice and Procedure — Compromise in existing and pending action — Enforcement of terms of compromise — Jurisdiction.

Where there is a compromise in an existing suit, the terms of that compromise can be enforced by a separate order in the suit, without commencing another action to enforce the terms of the compromise.

This was an appeal from a judgment of Whyatt C.J. [(1958) M.L.J. 131] on a motion in which he held that the respondents were entitled to recover from the appellants a sum of $5,379.21 together with costs of an application for judgment based on an agreement for compromise made out of Court in a pending action. The agreement was not brought to Court until the motion for judgment was filed. The Court of Appeal held that the procedure adopted by the respondents was correct and that the Court below had jurisdiction to make the order against which the appeal had been brought.

Cases referred to:—

(1) *Graves v. Graves* (1893) 69 L.T. 420 affirmed by C.A. in 28 L.J. Notes of Cases 558.
(2) *Green v. Rozen* (1955) 2 All E.R. 797.
(3) *Eden v. Naish* (1878) 7 Ch.D. 781.
(4) *Hakes v. Hodgkins* (1877) unreported.
(5) *Scully v. Dundonald* (1878) 8 Ch.D. 658.

COURT OF APPEAL, appeal from the decision of Whyatt C.J. (1958) M.L.J. 131.

R. H. Green for the appellants/defendants.

G. S. Hill for the respondents/plaintiffs.

Cur. Adv. Vult.

The judgment of the Court of Appeal was delivered by :

Tan Ah Tah J.: This was an appeal from a judgment of Whyatt C.J. on a motion in which he held that the plaintiffs were entitled to recover from the defendants the sum of $5,379.21 together with the costs of the motion.

The motion was filed in the following circumstances. By their statement of claim the plaintiffs claimed from the defendants the sum of $11,953.80 as damages for breach of contract in and about the carriage of bales of rubber by sea. The defence delivered by the defendants contained a total denial of liability. Subsequently, correspondence ensued between the defendants' solicitors and the plaintiffs' solicitors in an endeavour to arrive at a settlement. On the 28th March, 1958 the defendants' solicitors wrote a letter to the plaintiffs' solicitors the last paragraph of which reads as follows:—

"In an effort to settle this matter we have obtained instructions to offer you 45% of your clients' claim, each side to pay its own costs, that is to say, 45% of the sum of $11,953.80."

On the 2nd May, 1958 the plaintiffs' solicitors replied to the defendants' solicitors as follows:—

"We —— now have our clients' instructions to accept your clients' offer of 45% of our clients' claim, each side to pay its own costs, that is to say 45% of the sum of $11,953.80. We should be obliged if you would let us have your cheque for this sum at your earliest convenience."

It is clear from the terms of these two letters that, on the 2nd May, 1958, the solicitors for the parties, acting on their clients' instructions, reached a clear-cut agreement whereby the defendants were to settle the claim by payment of 45% of $11,953.80, that is to say, the sum of $5,379.21.

However, on the 7th May, 1958, in spite of what had happened, the defendants' solicitors wrote to the plaintiffs' solicitors to the effect that according to the defendants' records the claim of $11,953.80 was not correct and that the amount to be paid by way of settlement of the claim should be 45% of $7,446.40 and not 45% of $11,953.80. Further correspondence thereupon passed between the two firms of solicitors; during this exchange of letters the plaintiffs' solicitors took the stand that they were not prepared to agree to any alteration in the agree-

ment which had already been reached between the parties. Eventually, on the 28th May, 1958, the plaintiffs' solicitors wrote to the defendants' solicitors saying that they had instructions to apply for judgment and that unless they received a cheque by return they would serve the necessary papers on the defendants' solicitors without further notice. As no cheque was received by return the motion for judgment was filed on the 31st May, 1958.

Counsel for the defendants does not dispute that the agreement arrived at by correspondence is a binding agreement. His contention is that the plaintiffs adopted the wrong procedure in moving the Court for judgment in the way they did and that the Court below had no jurisdiction to enforce the agreement in the present action. He further contends that the plaintiffs' proper course was to have commenced a fresh action against the defendants to recover the amount payable under the agreement.

One of the cases upon which counsel for the defendants relies is *Graves v. Graves.* [1] That was an action which was compromised on terms. It would appear that one of the terms of the compromise was that the suit should be discontinued. There was, however, no stipulation that the terms should be made a rule of Court. As the parties could not agree upon the manner in which the terms should be carried out, the defendant moved the Court for an order that the terms should be made a rule of Court. During the argument, counsel for one of the plaintiffs submitted that the Court had no jurisdiction to make the order, as the suit had been discontinued. The motion was dismissed with costs by Barnes, J The defendant thereupon appealed to the Court of Appeal which dismissed the appeal (see (1893) 28 Law Journal Notes of Cases 558).

It is settled law that terms of compromise can be made an order or rule of Court only if there is a stipulation to that effect in the terms: if there is no such stipulation the terms cannot be made an order or rule of Court. It is important to notice that in *Graves v. Graves, supra,* the motion filed by the defendant was for an order that the terms of compromise should be made a rule of Court. In dismissing the motion, Barnes, J. said that his view was that there was no jurisdiction to make the order asked for because there was no agreement to make the terms of compromise a rule of Court. The report of the proceedings in the Court of Appeal is of interest as it shows that the appeal was dismissed upon another ground. In the first place, it is stated in the report that one of the terms of the compromise was that the suit should be discontinued. Secondly, the Court of Appeal is reported to have held that, as there was no longer an action pending, there was nothing upon which the Court could lay its hand so as to enforce the compromise, and the Court had consequently no jurisdiction in the matter. When the reports of the proceedings in the Court of first instance and the appellate Court are read together, it is in our opinion clear that the action had been discontinued in pursuance of the terms of the compromise and was therefore at an end.

It will be seen from the foregoing that the present case differs from the case of *Graves v. Graves, supra,* in the following respects. First, in the present case, the plaintiffs filed a motion for judgment; they did not move the Court for an order that the terms of the compromise should be made a rule of Court. Secondly, at the time the motion was heard, the present action was pending; it was not yet at an end. We are therefore of opinion that the defendants cannot derive any assistance from *Graves v. Graves* in this appeal.

In support of his contention, counsel for the defendants also relies on *Green v. Rozen.* [2] That was a case in which Slade, J. was informed by counsel, when the action was called on, that the action had been settled. The terms of settlement were indorsed on counsels' briefs but the Court was not asked to make an order staying further proceedings or any other order. In fact, the Court made no order of any kind whatsoever. Subsequently, when the defendants defaulted in carrying out the terms of the settlement, the plaintiff made an application in the original action to Slade, J. asking for judgment for the amount in default. In refusing the application, Slade, J. said:—

> "The Court made no order of any kind whatsoever, and, having considered such authorities as I have been able to find, I arrive at the conclusion that in those circumstances the new agreement between the parties to the action supersedes the original cause of action altogether, that the Court has no further jurisdiction in respect of the original cause of action which has been superseded by the new agreement, and that, if the terms of the new agreement are not complied with, then the injured party must seek his remedy on the new agreement."

In our opinion the view expressed by Slade, J. that the new agreement between the parties to the action superseded the original cause of action altogether must be taken to refer to the particular facts of the case before him. It must be remembered that, counsel having appeared before

the learned Judge and informed him that the action had been settled, and no order of any kind whatsoever having been made, the action was at an end. In the course of his judgment Slade, J. reviewed the various ways in which an action can be disposed of but it is to be observed that the learned Judge confined himself to those cases where terms of settlement are arrived at when the action comes on for trial or in the course of the hearing. The facts and circumstances of the present case are quite different from those in *Green v. Rozen, supra,* and, in our opinion, the decision in that case does not apply to the present case. There is no ground, in our judgment, for holding that the agreement reached by the parties on the 2nd May, 1958 in the present case superseded the original cause of action relied upon by the plaintiffs.

The present case differs from those cases to which we have referred in that it is an application for judgment based on an agreement for compromise made out of Court in a pending action. The agreement was not brought to Court until the motion for judgment was filed.

In support of his contention that the procedure adopted by him was correct counsel for the plaintiffs has cited the case of *Eden v. Naish.* [3] In that case, an action for dissolution of a partnership had been compromised by an agreement between the parties, made out of Court, whereby the plaintiff was to be paid the sum of £1,200 for the whole of his share and interest in the business, and was at once to cease all legal proceedings. Subsequently the plaintiff repudiated the agreement and intimated that he proposed to proceed with the action. The defendant then took out a summons, which was afterwards adjourned into Court and heard as a motion, asking that all further proceedings in the action might be stayed upon the terms contained in the agreement. The plaintiff resisted this application, contending that the defendant's proper course was to bring a separate action to enforce the agreement of compromise. This contention was rejected by Hall, V.C., who made an order, as asked by the summons, staying all proceedings in accordance with the terms of the agreement, and further ordered the plaintiff to pay the defendant's costs out of the sum of £1,200. This order as to costs, indicating as it does the fund out of which the costs were to be paid, is, in our opinion, highly significant as it shows that Hall, V.C. had in contemplation not only the stay of proceedings but the enforcement of the agreement. It is clear that, after the making of the order, the defendant was to be liable only for £1,200 less the amount of costs payable by the plaintiff.

In arriving at his decision, Hall, V.C. was following the unreported case of *Hakes v. Hodgkins* [4] which appears to have been decided on the 17th May, 1877. That was a case in which after pleadings had been delivered the parties reached an agreement to compromise the action. The plaintiff subsequently refused to carry out the agreement, and the defendants applied by summons to stay the action upon the terms of the agreement. The plaintiff objected that what was in effect specific performance of the agreement could only be obtained in a fresh action. The Master of the Rolls held that the Court had, under the Judicature Act, 1873, full jurisdiction to order upon the summons that all further proceedings should be stayed, and ordered that the agreement should be carried into effect.

It is to be observed that during the argument in *Eden v. Naish, supra,* counsel on both sides referred to sub-sections (5) and (7) of section 24 of the Judicature Act, 1873. These sub-sections are reproduced with slight alterations in paragraphs (e), (f) and (h) of section 3 of the Civil Law Ordinance (Cap. 24). In our opinion, paragraphs (e) and (f) are self-contained and contain nothing which derogates from the generality of paragraph (h).

The cases of *Hakes v. Hodgkins* and *Eden v. Naish, supra,* were referred to in *Scully v. Dundonald.* [5] There the plaintiff had commenced an action in the Common Pleas Division against the defendant to recover a commission claimed for services in obtaining payment of a sum from the Brazilian Government. This sum was being administered in the Chancery Division. On the plaintiff's application, made in the Chancery Division, an order was made for a sum of £5,100 to be set apart to answer the plaintiff's claim, and all further proceedings in the Chancery Division were stayed until after the trial of the action in the Common Pleas Division. Subsequently the action in the Common Pleas Division was compromised by an agreement made out of Court for payment by the defendant to the plaintiff of a certain sum of money. Shortly afterwards, the defendant sought to repudiate the agreement whereupon the plaintiff made an application by way of motion in the Chancery Division for an order for payment of the amount due to him under the compromise out of the sum of £5,100 which had been set apart. It was held by Malins, V.C. that the Court had no jurisdiction to make such an order, as it would thereby

be enforcing a compromise of an action in the Common Pleas Division. The plaintiff appealed to the Court of Appeal and the appeal was allowed on the ground that the Court had jurisdiction to make the order asked for by the plaintiff.

In his judgment in *Scully v. Dundonald* (5) Malins, V.C. said (at page 665):—

"If I had to decide this case...I should follow the decisions of the Master of the Rolls and Vice-Chancellor Hall in the case which has been referred to, of *Eden v. Naish*, where the Vice-Chancellor followed the decision of the Master of the Rolls in *Hakes v. Hodgkins*. There the Master of the Rolls decided, and in *Eden v. Naish* Vice-Chancellor Hall decided, that where there is a compromise in an existing suit, the terms of that compromise can be enforced by a separate order in the suit, without having recourse to filing another bill or commencing another action to enforce the terms of the compromise."

It is to be observed that in reversing the decision of Malins, V.C., the Court of Appeal differed from him only on the question of jurisdiction. In our opinion, it is plain that the underlying assumption in the judgments of the Lords Justices is that in the passage which we have cited Malins, V.C. correctly stated the law relating to the enforcement of a compromise in a pending action.

It follows therefore. in our judgment, that the procedure adopted by the plaintiffs in the present case was correct and that the Court below had jurisdiction to make the order against which this appeal has been brought.

We think it is desirable to add that we are dealing with a case where the terms of compromise are. as counsel for the defendants has conceded, within the scope of the action. We consider that it is unnecessary in this judgment to deal with the position where an agreement of compromise of an action contains matter which is not within the scope of the action.

For the reasons which we have stated this appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Braddell Bros.; Rodyk & Davidson.*

In re BAN HONG CO. LTD.

[O.C.J. (Rigby J.) January 13, 1959]

[Penang — Companies (Winding-up) Petition No. 1 of 1958]

Company — Compulsory Winding-up by the Court — Company unable to pay its debts — Companies Ordinance, 1940, s. 166.

This was a petition brought under section 166 of the Companies Ordinance by Messrs. Harrisons & Crosfield (Malaya) Ltd. (hereinafter referred to as the "Petitioners"), as creditors, for the compulsory winding-up by the Court of Messrs. Ban Hong Co. Ltd. (hereinafter referred to as "company") on the grounds that the said company was indebted to the petitioners to the extent of $89,673.75, that the petitioners had demanded payment, that the company has failed to pay, and that it was insolvent and unable to pay its debts.

Counsel on both sides agreed that there were only three main issues for consideration: (i) was there a *bona fide* dispute between the parties as to the liability of the company to pay this alleged debt? (ii) assuming this was a debt due from the company, was it in a position to pay its debts at the time of the presentation of this Petition? and (iii) was it otherwise just and equitable that the company should be wound up?

Held: (1) it is well settled law that a winding-up petition is not to be used as machinery to try a common law action, and that the presentation of a petition for winding-up simply with a view to enforcing payment of a disputed debt is an abuse of the process of the Court and should be dismissed with costs. But in this case there was no *bona fide* dispute as to the liability of the company for the amount claimed between the parties prior to the institution of these proceedings, and there is still no *bona fide* dispute;

(2) the company was unable to pay its debts at the time of the presentation of the petition;

(3) in all the circumstances of the case, it is just and equitable for the Court to order the winding-up of this company.

Observations on the conduct of the company.

COMPANIES WINDING-UP.

F. G. Pooley for the petitioners.

C. O. Lim for the company.

Rigby J.: This was a petition brought under section 166 of the Companies Ordinance by Harrisons & Crosfield (Malaya) Ltd. (hereinafter referred to as the "Petitioners")), as creditors, for the compulsory winding-up by the Court of Messrs. Ban Hong Co. Ltd. (hereinafter referred to as the "Company") on the grounds that the said Ban Hong Co. Ltd. was indebted to the petitioners to the extent of $89,673.75, that the petitioners had demanded payment, that the company had failed to pay, and that it was insolvent and unable to pay its debts.

I was fully satisfied that each and every one of those contentions was well founded and I accordingly made the Order sought.

The petitioners are, *inter alia*, rubber exporters; they have a licence to export rubber, but have no licence to smoke and pack rubber. They are accordingly compelled to purchase their rubber for export from other licensed dealers or producers or other licensed exporters.

The company was licensed to carry on the business of rubber packers and dealers.

In or about February, 1954, the petitioners, in furtherance of their business as rubber